No. 91

IN THE

Supreme Court of the United States

October Term, 1941

CHARLES R. FISCHER, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER FOR THE AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, AS PERMANENT LIQUIDATING RECEIVER OF THE AMERICAN LIFE INSURANCE COMPANY OF DETROIT, MICHIGAN, AND DAN E. LYDICK, RECEIVER OF THE AMERICAN LIFE INSURANCE COMPANY OF DETROIT, MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DAN E. LYDICK, RECEIVER OF AMERICAN LIFE INSURANCE COMPANY IN THE STATE OF TEXAS.

H. T. McGOWN
B. E. GODFREY
JOHN M. SCOTT
Fort Worth, Texas.
Counsel for Dan E. Lydick, Respondent, Receiver.

H. L. LOGAN, JR.
Of Counsel

Reimers-Taylor Company—Fort Worth, Texas

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BRIEF FOR DAN E. LYDICK, RECEIVER OF AMERICAN LIFE INSURANCE COMPANY IN THE STATE OF TEXAS.

STATEMENT OF THE CASE

Dan E. Lydick, Receiver, as respondent, adopts the statement of facts in briefs of respondents American United Life Insurance Company and John G. Emery, Receiver, filed in this court.

In order to make plain the points to be argued by Dan E. Lydick, Receiver, as respondent herein, the following additional facts are noted.

This case involves the right to administer, in insolvency proceedings, a deposit of securities of the in-

solvent company, American Life Insurance Company, of Detroit, Michigan, with the Commissioner of Insurance of the State of Iowa. The petitioner's action was brought in the United States District Court for the Southern District of Iowa, by Charles R. Fischer, [redacted] Commissioner of Insurance of the State of Iowa, [redacted] as receiver of the American Life Insurance Co. in Iowa against respondents Emery, American United Life Insurance Company, and this respondent, Dan E. Lydick, Receiver. The plaintiff's petition (R-1-9) sought an in personam judgment against the defendant Lydick, a resident and citizen of the State of Texas. (R. 2, 144). Service of process was made by registered mail upon the defendant Lydick, Receiver, at Fort Worth, Texas. (R. 10). The defendant, seasonably and in due order of pleading, filed his special appearance and motion to dismiss for lack of jurisdiction over his person. (R16-23). Such motion was overruled by the Trial Court (R. 27) to which action the defendant Lydick duly excepted (R. 28). Thereafter Lydick filed an answer in which he did not waive his prior pleas to the jurisdiction over his person, but, on the contrary, again urged the Court's lack of jurisdiction (R. 144). Following a trial the Court entered an in personam judgment against the defendant Lydick as follows:

(a) That the defendant Lydick account to and pay over to plaintiff forthwith all principal and income collected on securities deposited with the Commissioner of Insurance of the State of Iowa, (admitted by the parties to be a sum in excess of $40,000.00; see Paragraph 16 of plaintiff's petition, (R. 8) ,and Paragraph 15 of defendant Lydick's answer, (R. 146);

(b) The mandatory injunction that defendant Lydick turn over to plaintiff certain books and records. (R. 450), and

(c) A preventive injunction restraining the defendant Lydick from collecting either the principal or income on the deposited securities. (R. 450).

The securities in dispute between the Iowa Insurance Commissioner and Dan E. Lydick, Receiver, were of two general classes:

(a) Notes executed by individuals residing in Texas secured by liens on lands located in Texas. (R. 347). These notes aggregate, according to allegations of the complaint, $175,789.24. (R. 342).

(b) Notes executed by subsidiary Texas corporations, secured by liens on lands located in Texas. These notes aggregated $862,811.31, (R. 342), and were secured by 7,324.88 acres of Texas land (R. 342) in actual possession of Lydick, Receiver.

These subsidiary corporations were incorporated under the laws of the State of Texas and had their principal offices in Texas. Dan E. Lydick, as Receiver of American Life Insurance Company, was appointed Receiver of the six corporations, on August 2, 1938 and said corporations were thereafter, pursuant to order of the Texas Receivership Court, dissolved. (See stipulation R. 197 and exhibit on pg. 310). Dan E. Lydick, as Receiver of the American Life Insurance Company and of the subsidiary corporations, took possession of the lands securing the notes executed by

the subsidiary corporations, and operated said lands pursuant to the orders of the Court of his appointment in Texas. (R. 131-132).

The notes and mortgages, whether of individual Texas citizens or of Texas corporations, were delivered to the Commissioner of Insurance of Iowa unendorsed, and there were no written instruments of transfer duly signed and acknowledged of any of the notes and mortgages to the Insurance Commissioner of the State of Iowa. (R. 194). No notice was given to any obligor of any note or mortgage of its being deposited with the Insurance Commissioner of the State of Iowa, and at all times during the deposit period the American Life Insurance Company determined administrative questions relating to said securities, extended notes and mortgages included in the deposit, and handled said notes and mortgages in the same manner as all other securities belonging to the American Life Insurance Company not a part of the deposit. (R. 194). Furthermore, the American Life Insurance Company collected and retained all income of every kind and character from the notes in the deposit and did not account for such income to the Insurance Commissioner of the State of Iowa. (R.194). From the time of the execution of the deposit contract to the decree of the Iowa State Court vesting "title" to the deposited debts in petitioner, American Life Insurance Company likewise had the right, frequently exercised, of exchanging notes on deposit for other notes of American Life Insurance Company provided the quality and amount of the aggregate deposit was not thereby depleted. Code of Iowa 8664. (R. 221).

The Texas Court appointing Lydick, Receiver, acquired jurisdiction pursuant to the filing of the petition on May 29, 1938. (R. 196). These proceedings antedated the beginning of the Iowa State Court proceedings, which were commenced on June 17, 1938, (R. 200), and likewise the date as fixed by the Iowa State Court when the purported "title" vested in petitioner "on and as of June 17, 1938." (R. 305). The order of the Texas Court appointing Lydick Receiver, directed him to

> "receive and collect and hold all payments upon mortgages, contracts, notes, bonds and other evidence of indebtedness now due and owing, or which may hereafter become due and owing to the defendant company by any debtor of the American Life Insurance Company***" (R. 294).

Pursuant to that order Lydick collected money from individuals who owed notes to American Life Insurance Company, and at the time of the trial had in his possession approximately $40,000.00 in money. The Trial Court entered a judgment against Dan E. Lydick, Receiver, directing him to pay over such money to the Commissioner of Insurance of the State of Iowa. (R. 447).

The Trial Court likewise by judgment directed Lydick, Receiver, to deliver to petitioner all revenues, income, and books and records pertaining to deposited notes of the holding companies secured by lands in the actual possession of Lydick, (R. 450), and being operated by him. (R. 131-132).

The deposit with the Iowa Insurance Commissioner aggregated $3,606,273.36, (R. 342), and of the deposit only one mortgage, $23,300.00 in amount, was due from a resident of Iowa and secured by lands located in Iowa. (R. 342). The remainder of the deposit consisted of notes secured by mortgages due from citizens of other states, principally Texas and Michigan, and secured by liens on lands there located. (R. 342-355). A part of the deposit consisted of stocks and bonds aggregating $15,000.00 and policy loans aggregating $1,080,-371.29. With respect to the bonds and policy loans, respondent Lydick, Receiver, claims no interest therein. (R. 350).

American Life Insurance Company had policies of insurance outstanding on lives of citizens of the State of Texas. A portion of that group of policyholders was a part of the group of business called the "Des Moines" business. (R. 133). A part of the Texas business was not in the Des Moines group. (. 133).

SUMMARY OF ARGUMENT

I

American Life Insurance Company had a contract right and duty to administer the deposited notes, which right and duty vested in Respondent prior to the commencement of the Iowa State Court proceedings, and the Trial Court had no jurisdiction of an action seeking to divest Respondent Receiver of any property in prior custodia legis. (Germane to Petitioner's Points I-VII inclusive)

II

The Trial Court lacked jurisdiction to divest this Respondent Texas Receiver of the prior actual possession of 7,324.88 acres of land owned by Texas Corporations, for which Respondent had been appointed a general receiver in a plenary proceeding. (Germane to Petitioner's Points I-VII, inclusive.)

III

The notes due from Texas residents secured by Texas land are not in the possession of an adverse holder under color of title, but are held by the Receiver of American Life Insurance Company in Iowa. The Trial Court lacked jurisdiction in a collateral proceeding to review the rulings of the two State Courts in Texas and Iowa respecting their jurisdiction. (Germane to Petitioner's Points I-VII, inclusive.

IV

The Trial Court had no jurisdiction to render an in personam judgment against Respondent Texas Receiver in the absence of personal service, where such personal service was not waived by Respondent Texas Receiver. (Germane to Petitioner's Points I-VII, inclusive.)

ARGUMENT

I

American Life Insurance Company had a contract right and duty to administer the deposited notes, which right and duty vested in Respondent prior to the com-

mencement of the Iowa State Court proceedings, and the Trial Court had no jurisdiction of an action seeking to divest Respondent Receiver of any property in prior custodia legis. (Germane to Petitioner's Points I-VII, inclusive.)

No issue can arise as to the existence of the established rule of law, referred to as the rule of the res cases, and exemplified by *Farmers Loan & Trust Co. V. Lake Street Elevated RR Co.* 177 U. S. 51, 44 L. Ed. 667:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.*** The rule has been declared to be of special importance in its application to Federal and State Courts."

The same rule is declared by this court in *Penn General Casualty Company* v. *Commonwealth of Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463 80 L. Ed. 331; *Pufahl* v. *Parks*, 299 U. S. 217, 81 L. Ed. 133; *Lion Bonding & Surety Co.* v. *Karatz*, 67 L. Ed. 871, 262 U. S. 77; *Richle* v. *Margolies*, 73 L. Ed. 669, 279 U. S. 218.

Nor is there any doubt that the exclusive jurisdic-

tion of the court possessing a res attaches upon the filing of a bill having as its object the ultimate judicial seizure of the res. *Barton* v. *Barbour*, 104 U. S. 126, 26 L. Ed. 672. This is also the law of Texas. *Riesner* v. *Gulf, C. & S. F. Ry. Co.* (Sup. Ct. Tex.) 36 S. W. 53, 89 Tex. 656.

There is another principle of law upon which there is no dispute; the rule of law upon which the decree of the Eighth Circuit of Appeals is necessarily predicated. That rule, one which we fully recognize and rely upon, is that a receiver takes possession of all of the property, tangible and intangible, and all of the powers, duties, rights and interests of the insolvent, subject to all claims, liens and equities against such properties, rights and powers. Petitioner would make it appear that this rule has been violated by the opinion of the Circuit Court of Appeals (Petitioner's Brief P. 31), and that is the basis for the misunderstanding of this litigation evidenced by the dissenting judge. It is not the claim of Respondent Lydick that any existing liens or equities against property in Respondent's possession were divested or affected by his appointment. The issue in his litigation is whether any properties, rights and powers in Respondent are sought to be divested by the action filed by petitioner in the United States District Court in Iowa. If that action had sought the mere enforcement of a lien within the rule of *U. S.*, v. *Klein*, 303 U. S. 276, 82 L. Ed. 840, without affecting the powers, rights and duties of this Respondent as Receiver, then this Respondent would not have resisted the maintaining of the action, indeed would not have

been a property party defendant. The difficulty exists in determining what the facts are; when the facts are properly analyzed, the result is clear.

It is plain and so stipulated (R. 192) that beginning on August 24, 1921, the American Life Insurance Company with respect to the vendor's lien notes on deposit with the Insurance Commissioner of the State of Iowa had the power, duty and right to collect each note in the deposit; to enforce each mortgage lien in the deposit, to administer by extension, renewal and foreclosure each note and mortgage lien in the deposit to the same extent and in the same manner that it controlled and administered its other assets not a part of the deposit. The vendor's lien notes and liens on deposit with the Iowa Commissioner were not endorsed or transferred by any written instrument, nor was such character of transfer required by the Iowa Statutes, Section 8665 (R. 221). American Life Insurance Company collected and retained all interest upon the deposited debts. American Life Insurance Company was under no duty nor did it in fact account to the Iowa Commissioner for proceeds collected on notes covered by the Deposit Agreement. The insurance company's sole duty and the sole right of the Iowa Commissioner under the Deposit Agreement was that promissory notes in the aggregate required amount would at all times be maintained in the physical possession of the Iowa Commissioner. The insurance company was expressly given the privilege of exchange and substitution of other debts and mortgage liens so long as the character and amount of the deposit was not thereby impaired. Section 8664 Code of Iowa (R. 221).

Effective as of May 29, 1938, Dan E. Lydick was appointed receiver for American Life Insurance Company in the State of Texas. At the time of such appointment no action of any sort had been taken by the Insurance Commissioner of the State of Iowa. (This Brief p. 5).

Thus under the law the Texas Court on May 29, 1938, acquired all of the rights, powers and duties to administer the deposited notes that were on that date vested in American Life Insurance Company, subject, of course, to the domiciliary court in Michigan, which had then appointed a primary receiver.

Thereafter, and subsequent to the acquisition of jurisdiction by the Texas court, the Iowa proceedings were commenced on June 17, 1938, and resulted in, by that Court's decree, a passage of title to the State of Iowa "on and as of June 17, 1938". (This Brief p. 5).

Respondent does not contend that no interest in the deposited notes passed to the State of Iowa, or to petitioner, but does contend that in so far as petitioner seeks to diminish, annul or divest the powers of the Texas court and receiver, such action can be urged only in that court, where those powers are now exercised pursuant to its order. (This Brief p. 5).

Does petitioner contend that the power to collect the deposited debts did not become custodia legis? That question has been litigated before. In *Tolfree* v. *New York Title & Mortgage Co., et al.*, 72 Fed. (2d) 702;

Cert. denied 79 L. Ed. 707, the facts were exactly like the case at bar on this point. The New York Title & Mortgage Company had deposited notes and mortgages due it with the Bank of Manhattan, as collateral security for mortgage creditors. A state court receiver was appointed for the depositing company. The holders of the mortgages filed a bill in the United States Court for the Northern District of New York against the state court receiver, and others, seeking an injunction against the state court receiver to prevent his administration of the deposited debts. The exact question involved here was there presented: Did the bill require the invasion of the jurisdiction of the state court receiver with respect to any power lawfully exercised by him as receiver? The Court held:

> "Accordingly when the superintendent, by order of the New York Supreme Court, took over the assets of the title company, it took over a going business, together with a right to administer the mortgages. By virtue of the order and article 11 of the New York Insurance Law (section 400 et seq.), the superintendent became in effect a receiver under the supervision of the state court and the property under his control became custodia legis. *People* v. *Title & Mtg. Guar. Co., 264 N. Y* 69, 190 N. E. 153; *Isaac v. Marcus,* 258 N. Y. 257, 179 N. E. 487; *Matter of Casualty Co. of America,* 244 N. Y. 443, 155 N. E. 735; *Lafayette Trust Co. v. Beggs,* 213 N. Y. 280, 107 N. E. 644; *Kline v. 275 Madison Avenue Corporation,* 149 Misc. 747, 749, 268 N. Y. 582. In such circumstances, under established rules of law, the federal courts should not in-

terfere with the possession of the state court. *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; *Harkin v. Brundage*, 276 U. S. 36, 48 S. Ct. 268, 72, L. Ed. 457; *Farmers' Loan & Trust Co. v Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61, 20 S. Ct. 564, 44 L. Ed. 667; *O'Neil v. Welch* (C.C.A.) 245 F. 261; *People's Trust Co. v. United States* (C. C. A.) 23 F. (2d) 381."

In *People of New York* v. *Title & Mortgage Guaranty Company*, 264 N. Y. 69, 190 N. E. 153, the New York Court of Appeals had the same point for decision, and it was held:

"The statutory receiver of a corporation subject to the provisions of the Insurance Law, may certainly administer the property of such corporation, even though a creditor has a lien on some of such property, at least where the corporation itself has power of administration . . . . Even if the corporation had a right to administer the investments only as a judiciary or agent, the investments could not be abandoned, and the superintendent might be empowered to administer them at least until they were claimed by the owners or some person authorized to represent the owners . . . Where the administration of property is the duty and part of the business of a corporation, taken over by a liquidator or rehabilitator, then the continued administration by him is is merely an incident of the liquidation or rehabilitation proceedings, and deprives those interested in such property of no rights . . . "These powers are no greater than are ordinarily exercised by a receiver appointed in

> an equity action to conserve the fund, and the Legislature could vest them in the superintendent of insurance."

These cases make clear the position we insist upon. Under the stipulated record the administration of the deposited notes and mortgages, by the very terms of the Iowa contract and statutes, was the duty of American Life Insurance Company. That duty of administration vested in Lydick, Receiver, insofar as necessary to administer debts due from citizens of Texas, by the filing of the bill in the Texas court on May 29, 1938 (R. 294). Thereafter on June 17, 1938, (R. 296), the Iowa State Court proceedings were commenced, resulting in what that court denominated as a passage of title to petitioner "on and as of June 17, 1938," (R. 305). Petitioner contends that thereby there was an ipso facto divestiture from Lydick of the power and duty then being exercised by him under the Texas court order (R. 294), and the preceding authorities, to administer the debts. Lydick, Receiver's, point and contention is that no property or duty exercised by him under the state court order can be divested by subsequent Iowa decree. It follows that a decree of the trial court in the case at bar commanding Lydick to surrender such powers, money, and tangible and intangible property is an invasion of the jurisdiction of the court appointing Lydick, Receiver. The result sought by respondent Texas receiver is consonant with the best interests of the public in administering the assets of any insolvent corporation. It tends in all cases, except where the properties are held adversely at the time of insolvency, to result in a centralized

administration. It promotes the efficiency of reorganizations, whether in bankruptcy or general receivership. In the case at bar it preserves the benefit of the reinsurance plan and likewise the equities of the Des Moines group in the deposited assets, as those equities are recognized by the principal receiverships. (Aptly discussed in brief of American United Life Insurance Company, page 21; brief of respondent Emery, page 38).

In our judgment the position just presented requires an affirmation of the decree of the Circuit Court of Appeals of the Eighth Circuit. Necessarily there remains in petitioner, by that decree, the right to present his lien claim to the respective state courts exercising the power of collecting the deposited debts, and under established principles, such lien will there be recognized. Petitioner is thus deprived of no right, nor of any property. The result of such a holding simply is that the reorganization of the insolvent life insurance company proceeds under established principles, in orderly fashion. Useless receivership and administration expenses are avoided.

In the case at bar there exists a mechanical and physical necessity for a domiciliary receiver, together with such ancillary proceedings as are necessary in the courts having physical control of the several debtors. Petitioner seeks to create by his position an additional, unnecessary, and expensive separate insolvency proceeding charged with the sole duty of collecting these debts. If petitioner's claim is sustained, he will certainly require ancillary proceedings

in each state having physical control of property he would reduce to his possession. There is only one debt and mortgage which can be enforced in the State of Iowa, and that debt and mortgage is shown in the record at page 342, and amounts to $23,300.00 as against a total deposit of $3,606,273.36 (R. 342). The bulk of the debts and mortgages are due from Texas citizens and are secured by Texas land. These Texas debts aggregate $1,038,600.55 and are 105 in number (R. 342-355). If petitioners' claim is sustained, there will of necessity be two receivership proceedings in Texas: One proceeding charged with the administration of assets not deposited, the other proceeding, ancillary to petitioner's suit, charged with the sole duty of collecting debts involved in the deposit. The same situation will exist in Michigan, Oklahoma, Indiana, Kansas, Minnesota, Montana, North Dakota, South Dakota, Wyoming (R. 342). The inevitable result of the sustaining of petitioner's claim is that useless and unnecessary receivership and administration expenses will consume a large part of trust funds otherwise available to meet the policy claims of American Life Insurance Company.

The argument just presented, it is submitted, is wholly independent of the necessity of support by corollary authority. Dissenting Judge Johnson, however, was concerned lest such a decree impair the sovereignty of Iowa over property within her borders. That issue is not here. The case turns upon the power and right to collect the debts constituting the deposit. There is only one debt and mortgage which can be enforced in Iowa, that is, due from an Iowa resident and

secured by Iowa land. (R. 342). The bulk of the deposit consists of debts due from citizens of Texas and Michigan. (R. 342). The physical power to collect the Iowa debt, and a fortiorari its locality for administration, is in the Iowa state court appointing petitioner. Respondent Texas Receiver has no interest in such debt by the very terms of the order of his appointment. (R. 290).

However it may be noted that the decisions of this Court have settled the issue of whether the power to collect a debt has a locality for administration in a state other than the debtor's residence. They are not vital to our position, but serve to fit it into the mosaic of settled principles of conflicts of law. They further make plain the false premise of petitioner's argument that the notes were property in Iowa. (Petitioner's Brief p. 22). Bearing in mind that the issue is the power to collect a debt as having a locality for administration, we examine the authorities:

In the case of *Wyman* v. *Halstead*, 109 U. S. 656, 27 L. Ed. 1068, the Court said:

> "*****The bill or note does not alter the nature of the debt, but is merely evidence of it, and, therefore, the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

The same principle was applied by this Court in *Cunnius* v. *Reading School District*, 198 U. S. 458, 49 L. Ed. 1125, wherein the Court said:

> "That the debt due the absentee by the school

district, resulting from the establishment of her dower, was within the jurisdiction of the state authority, is clear. It would undoubtedly have been subject to administration under the laws of Pennsylvania had the absentee been in fact dead. *Wyman* v. *Halstead (Wyman* v. *United States)*, 109 U. S. 654, 27 L. Ed. 1069, 1069, 3 Sup. Ct. Rep. 417; *Sayre* v. *Helme*, 61 Pa. 299; *Mansfield* v. *McFarland*, 202 Pa. 173, 174, 51 Atl. 763."

Again in *Chicago, R. I. & Pac. Ry. Co.* v. *Sturm*, 43 L. Ed. 1144, 174 U. S. 711, the Court said:

"This court said by Mr. Justice Gray in *Wyman* v. *Halstead*, 109 U. S. 656 (27: 1069): 'The general rules of law is well settled, that for the purpose of founding administration all simple-contract debts are assets at the domicile of the debtor.' And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requires it to protect home creditors. *Wilkins* v. *Ellett*, 9 Wall. 740 (19:586); 108 U. S. 256 (27:718).

"The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it you must go to the domicile of his debtor, and only do it under the laws and procedure in force there. This is a legal necessity and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the res, and gives character to the action

> as one in the nature of a proceeding in rem. *Mooney* v. *Buford & Geo. Mfg. Co.*, (134 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, Sec. 549, and notes."

And it was recognized by Mr. Justice Brandeis in the case of *Pennington* v. *Fourth National Bank of Cincinnati*, 243 U. S. 269, 61 L. Ed. 713, and, of course, likewise in the leading case of *Harris* v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023.

Petitioner contends that his contract of deposit and his Iowa decree had the effect of divesting from respondent receiver Lydick the power and duty of collecting the debt. This position assumes that by reason of the contract there was no judicial power in the State of Texas to administer upon the debts so far as necessary to protect its local citizens notwithstanding the foreign assignment. But this Court has again and again declared that an assignment intended to secure creditors in the event of insolvency, and executed outside of the state having physical control of the debtor, need not be recognized in that state in derogation of the rights of local insolvency proceedings.

The leading case is *Security Trust Co.* v. *Dodd*, 173 U. S. 624, 43 L. Ed. 835. That opinion divides all assignments of this type into two general classifications. If the assignment is a voluntary assignment, not required by statute, the Court said:

> "Such assignments will be respected except so far as they come in conflict with the rights of local creditors, or with the laws or public

policy of the state in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. (Citing authorities).

In discussing assignments required by statute, the Court held:

"***the prevailing American doctrine is that conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states, it is given only such effect as the laws of such state permit; and, that in general, it must give way to claims of creditors pursuing their remedies there. (Citing Authorities). ****A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; a national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding in rem against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment."

And in *United States of America* v. *Belmont*, 81 L. Ed. 1134, 301 U. S. 324, the Court held that:

"It (the state) is likewise free to disregard the transfer where the subject of it is a chose in action due from a debtor within the state

> to a foreign creditor.****The chose in action in action is so far within the control of the state as to be regarded as located there for many purposes. *Wyman* v. *Halstead (Wyman* v. *U. S.)* 109 U. S. 654, 27 L. Ed. 1068, 3 S. St. 417; *Chicago, R. I. & P. R Co.* v. *Sturm,* 174 U. S. 710, 43 L. Ed. 1144, 19 S. Ct. 797; *Harris* v. *Balk,* 198 U. S. 215, 49 L. Ed. 1023; *Pennington* v. *Fourth Natl. Bank.* 243 U. S. 269, 61 L. Ed. 713; *Security Savings Bank* v. *California,* 263 U. S. 282, 69 L. Ed. 301, 44 S. Ct. 108, 31 A. L. R. 391; *Corn Exch. Bank* v. *Coler,* 280 U. S. 218, 74 L. Ed. 378; Re: *Russian Bank for Foreign Tract* (1933) Ch. 745; Am. Law. Inst. Restatement, Conflict of Laws, Secs. 108, 213."

These decisions make plain the real application of the principle of *Clark* v. *Williard,* 79 L. Ed. 865, 294 U. S. 211. That case affirmed the sovereignty of a state over property having a locality fixed within its borders. The very authority cited by Mr. Justice Cardozo in that opinion *(Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 52 L. Ed. 625, 28 S. Ct. 337), was a case where the "property" was a debt due from a citizen of Wisconsin and was held to have a fixed locality in Wisconsin for the purpose of enforcing payment. It is not the claim of this respondent, Lydick, receiver, that he is entitled to the possession of any property in the State of Iowa. The purpose of the action filed by petitioner, however, is to secure a power necessarily located in Texas to collect debts from Texas citizens, notwithstanding the local insolvency proceedings. *Clark* v. *Williard* is conclusive against petitioner's position, and his attempt to cite

it as authority is predicated wholly on a confusing of the facts. The dissenting judge was confused, treating this action "as one to foreclose a lien on property in Iowa." As a matter of fact, there is no semblance here of an action to foreclose a lien, and the decisions of this Honorable Court just cited establish clearly that the power to administer the foreign debts was not property in Iowa.

Therefore:

The power to administer the debts was in American Life Insurance Company on May 29, 1938, by the terms of the contract of deposit and the germane Iowa statutes (This brief Pages 10 to 12).

That power on that date vested in Respondent, Lydick, and thereby was in custodia legis, wholly withdrawn from the judicial power of the United States District Court, sitting in Iowa, but subject, of course, to liens against the property and powers enforcible so long as the possession of the powers and property of Lydick, Receiver, was not affected. The instant suit was a personal action resulting in a comprehensive injunction and "turn-over" order divesting Lydick, Receiver, of such powers, properties, moneys, and real estate. It, therefore, could not be maintained in the United States District Court, and the decree of the Circuit Court of Appeals dismissing it should be affirmed.

II

The Trial Court lacked jurisdiction to divest this Respondent Texas Receiver of the prior actual pos-

session of 7,324.88 acres of land owned by Texas Corporations, for which Respondent had been appointed a general receiver in a plenary proceeding. (Germane to Petitioner's Points I-VII, inclusive.)

Wholly independent of the preceding argument relating to vendor's lien notes, Respondent Texas Receiver had actual possession of Texas lands owned by corporations, of which the stock was held by American Life Insurance Company. These corporations were chartered in the State of Texas, under its laws, and the principle offices of said corporations were there located. Notes were executed by the corporations secured by liens on Texas land, the notes aggregating $862,811.31 and the security Texas land aggregating 7,324.88 acres. (R. 342). The notes were deposited in Iowa, and the decree of the Trial Court divested Respondent Texas Receiver of the authority to remain in possession of the land and administer and operate it. (R. 342 and 450). That is the effect of the decree taken with the opinion (R.444) and the complaint (R. 342).

Respondent Texas Receiver was appointed Receiver of all of the assets of the Texas debtor corporations, including the land securing the deposited notes by order of the 96th District Court of Tarrant County, Texas, in a suit brought against the corporations by Lydick as Receiver of American Life Insurance Company, and after process had been served on the corporations. (310-312, Stipulation R. 197).

The effect of the appointment of a Receiver for a corporation is to vest in the Court appointing the

Receiver all of the rights, title and interest of the debtor corporation. The Receiver has been held to "stand in the shoes" of the corporation. He has the same right the latter would have had. *Horn* v. *Pere Marquette Ry Co.* 151 Fed. 626. Thus, regardless of the decision reached by this Court on the right of the Iowa Receiver to maintain this action insofar as it is discussed ante pages 8 to 22, with respect to notes executed by individuals, nevertheless Respondent Texas Receiver is the only authority who can administer and control the land itself. It is inescapable that the 96th District Court of Tarrant County, Texas is the only forum that can pass upon the title or divest the possession of its receiver. Is it within the jurisdiction of a Federal Court sitting in Iowa to review the decree of the State Court in Texas, and by injunction divest the state court of possession? The question answers itself.

Consider the chaos that would result if a different conclusion were reached. The Texas Receiver went into possession of the 7,324.88 acres of land and for three and one-half years has been operating and farming said land, employing some thirty field hands, tractors, and farming machinery, under order of the Texas court. (R. 127-131). If this Court holds that the Trial Court had authority to decree in Petitioner a right to administer the deposited debts independent of the Texas receivership, then as a result the Iowa Commissioner would of necessity seek an ancillary receivership in Texas in support of his Iowa receivership, and such ancillary receiver would attempt to

acquire possession of the land without the question of the right to possession ever having been presented to the 96th District Court of Tarrant County, Texas, now having possession. No more chaotic situation could be imagined.

III

The notes due from Texas residents secured by Texas lands are not in the possession of an adverse holder under color of title, but are held by the Receiver of American Life Insurance Company in Iowa. As between the state receivership courts in Texas and Iowa, the Trial Court lacked jurisdiction in a collateral proceeding to review the rulings of the two State Courts respecting their jurisdiction. (Germane to Petitioner's Points I-VII, inclusive).

Circuit Judge Johnson in his dissenting opinion below said:

> "Had the Iowa deposit been one of mere bailment with no charge or lien on the securities I should have no difficulty naturally in concurrence (with the decision of the majority)".

However, Judge Johnson did dissent to the decision of the majority of the Court and an examination of the reason which he gives for such position renders it evident that his dissent is founded on an erroneous premise of mixed fact and law. The mistaken premise which is the foundation of the dissent is clearly this: Judge Johnson considers the promissory notes as de-

posited with the Insurance Commissioner of the State of Iowa under the Deposit Agreement to be in possession of the Insurance Commissioner of Iowa, and that the Insurance Commissioner of Iowa, while in possession, is asserting a colorable adverse claim thereto. In short, Judge Johnson finds that the Insurance Commissioner of Iowa is in possession of the notes holding adversely. This is directly contrary to the opinion of the majority of the Court.

Judge Johnson's error was evidently caused by reason of the fact that he wholly failed to consider the dual capacity of Charles R. Fischer, which is: (1) Charles R. Fischer is the Insurance Commissioner of the State of Iowa; (2) Charles R. Fischer is the Receiver of American Life Insurance Company in the State of Iowa.

We are in thorough accord with the legal and practical necessity of a continued adherence to the rule that neither a receiver nor the court of his appointment has authority by summary action to take into custody property in the possession of strangers to the suit, claiming adversely. *First National Bank* v. *Chicago Title & Trust Company*, 198 U. S. 280, 49 L. Ed 1051.

The error inherent in the dissenting opinion consists in the fact that it ignores the dual capacity of Charles R. Fischer and thus wholly ignores the necessary application of another rule of law as firmly founded in necessity as that given above, namely that a court in lawful possession of property has the an-

cillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. *Murphy* v. *Hofman* 211 U. S. 562, 568, 569, 53 L. Ed. 327. Thus if a third party in possession of property and asserting a specific lien against such property voluntarily surrenders possession of the property to a bankruptcy or receivership court, such surrender constitutes an unqualified consent to the exercise of exclusive jurisdiction over such property by the court. The court then has the same jurisdiction over the property with respect to a determination of the interests of all parties therein as though the debtor had himself been in possession of the property at the time of the appointment of the receiver. Matter of *H. N. Kouri Corporation*, (C.C.A. 2nd. Cir.) 66 F. (2d) 241; *Wells & Company* v. *Sharp* (C.C.A. 8th Cir.) 208 F. 393; *Wright* v. *Harris* (D. Ct. Ga.) 221 F. 736. Aff'd 228 F. 1021, Cert. Den 241 U. S. 658, 60 L. Ed. 1225; *Ex Parte Davidson*, 57 F. 883; *Sullivan* v. *Colby*, 71 F. 460.

With respect to the instant case, on June 17, 1938, the Attorney General of the State of Iowa, as plaintiff, filed a petition in the District Court of Polk County, Iowa, for the appointment of a receiver for all property of the American Life Insurance Company situated in the State of Iowa (R. 198, 296). On the same date Maurice V. Pew (who was then also Insurance Commissioner of the State of Iowa), was appointed temporary receiver (R: 198, 301). Thereafter on Oct. 30, 1939 Charles R. Fischer (who had succeeded Maurice V. Pew as Insurance Commissioner of the State of Iowa), was appointed receiver for American Life In-

surance Company in the State of Iowa (R. 2, 198, 304). In addition to the general powers usually vested in receivers, the order appointing Charles R. Fischer receiver specifically directed:

> "That said *Receiver is authorized and directed to administer all of the securities* of the defendant company on deposit with the Insurance Commissioner of the State of Iowa and in his possession as temporary receiver . . . That . . . *said Receiver be and he is authorized and directed to deal with said securities in his name as receiver* subject to approval or ratification by order entered in this cause."

No party to this proceeding has ever denied that since June 17, 1938, physical possession of such securities has been in Receiver for American Life Insurance Company in Iowa. Fischer himself admits that since June 17, 1938, he has held possession as Receiver and not as Insurance Commissioner of the State of Iowa (Par. 17 of complaint R. 6, Stipulation Par. 19, 22, R. pp. 199-201, Motion R. 370, 377). It follows that such securities at the time of the commencement of the instant controversy were not in the physical possession of a lien holder asserting an adverse interest therein, but on the contrary were in the physical possession of the Receiver of American Life Insurance Company in the State of Iowa.

Thus, the entire controversy presented to the Trial Court was the attempt by Fischer, as receiver in Iowa, to support as against Texas Receiver, respondent, and the Texas state court the jurisdiction of the Iowa state court to administer the obligations evidenced by

the promissory notes as covered by the deposit agreement. As to this conflict between the two state courts Judge Sanborn's opinion is necessarily and fundamentally sound when it states:

> ". . . We would still be of the opinion that the court below could not be called upon to decide which of the two state courts has the right to administer these assets of the Michigan company and to determine controversies respecting them. The decisions and rulings of these two state courts relative to their respective jurisdiction are not subject to review or to collateral attack in a Federal court." (Citing authorities).

For yet another reason the decision of the majority opinion in the court below decreeing a lack of jurisdiction in the Trial Court is sound. Under the authority of *Wyman* v. *Halstead*, and authorities cited (p. 17 this brief) the obligations owed by residents of Texas and secured by liens on lands situated in Texas constitute properties in Texas and as property in Texas can only be administered by the Texas receiver.

Where the sole question is a controversy between Fischer, as Receiver for American Life Insurance Company in Iowa, and Lydick, Receiver for American Life Insurance Company in Texas, to determine which Receiver shall administer the obligations, every practical consideration requires the recognition of the rule that the forum having control of the debtors, and the lands securing the debts, shall administer the assets. Even the Trial Court conceded this in

his opinion (R. 444). In this state of the facts and law, the Supreme Court of Texas has determined that the ancillary receiver in Texas is the only party who can enforce such notes and liens in the courts of that State. In the case of *Farm & Home Savings & Loan Assn. of Missouri* v. *Breeding, et al,* 115 S. W. (2d) 615, in recognizing the exclusive power of a Texas ancillary receiver to enforce notes executed by Texas debtors and secured by liens on Texas land, the Court said:

> "Undoubtedly the indebtedness held by the Farm & Home Savings & Loan Association secured by liens upon lands in Texas constituted 'the business, property and affairs' in Texas of said association. It is also undoubtedly true that upon appointment of Stevenson as receiver by the District Court of Travis County, all of such 'business, property and affairs' was placed in custodia legis. Admittedly the receiver in Missouri could not enforce liens by deeds of trust sales in Texas of lands in Texas. A receiver in Texas became absolutely necessary. The fact that he was designated an ancillary receiver did not make him any less a primary receiver so far as Texas business and properties were concerned. Upon the courts in Texas rested the duty of preserving and administering the estate situated within this state, and upon it rested the duty of collecting demands enforceable within this state. The power to collect included very power necessary to be exercised in making the collection and enforcing the lien."

For such reasons the Circuit Court of Appeals be-

low properly held that the District Court of the United States for the Southern District of Iowa lacked jurisdiction to entertain the cause of action filed by Charles R. Fischer as Receiver for the American Life Insurance Company in Iowa against Dan E. Lydick, Receiver.

IV

The Trial Court had no jurisdiction to render an in personam judgment against Respondent Texas Receiver in the absence of personal service, where such personal service was not waived by Respondent Texas Receiver. (Germane to Petitioner's Points I-VII, inclusive.)

The plaintiff's petition (R. 1-9) sought an in personam judgment against the defendant Lydick, a resident and citizen of the State of Texas (R. 2, 144). Service of process was made by registered mail upon the defendant Lydick at Fort Worth, Texas (R. 10). The defendant seasonably and in due order of pleading filed his special appearance and motion to dismiss for lack of jurisdiction over his person (R. 16-23). Such motion was overruled by the Trial Court (R. 27) to which action the defendant Lydick duly excepted (R. 28). Thereafter Lydick filed an answer in which he did not waive his prior pleas to the jurisdiction over his person but on the contrary again urged the Court's lack of jurisdiction (R. 143). Following a trial the Court below entered an in personam judgment against the defendant Lydick as follows: (R. 450):

> (a) That the defendant Lydick account to and pay over to plaintiff forthwith all princi-

pal and income collected on securities deposited with the Commissioner of Insurance of the State of Iowa (admitted by the parties to be a sum in excess of $40,000.00, see paragraph 16 of plaintiff's petition, R. 8, and paragraph 16 of defendant Lydick's answer, (R. 146);

(b) The mandatory injunction that defendant Lydick turn over to plaintiff certain books and records (R. 450) and,

(c) A preventive injunction restraining the defendant Lydick from collecting either the principal or income on the deposited securities (R. 450).

Section 57 of the Judicial Code is expressly limited to actions "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought." Thus process issued under the authority of Section 57 cannot be used to obtain a judgment in personam against a nonresident defendant who contests the jurisdiction of the Court. *Ladew* v. *Tennessee Copper Company*, 218 U. S. 357, 367, 54 L. Ed. 1069, 1072, *Wetmore* v. *Tennessee Copper Company*, 218 U. S. 369, 54 L. Ed. 1073.

Manifestly the action of the Trial Court in decreeing that the defendant Lydick "should account to and pay over to plaintiff" a sum which the parties admitted exceeded the sum of $40,000.00 was purely of an in personam nature. It is well established that over the objection of a nonresident defendant process under *Section 57 of the Judicial Code* will not support

such an in personam relief as an accounting and a money judgment. In the case of *Gage* v. *Riverside Trust Company* (Cir. Ct. S. D. California) 156 F. 1002, 1005, the Court said: (P. 1005)

> "The bill, so far as it seeks an accounting, injunction, and receiver, affords no ground for substituted service, since, in these respects, it is a proceeding in personam and not in rem."

The in personam nature of the relief granted as against the defendant Lydick was not limited to a decree for an accounting and money judgment but went further and granted as against the defendant Lydick both a mandatory and a preventive injunction. "An injunction is a remedy, which above all others operates in personam," *Pomeroy Equity Jurisprudence*, Sec. 1360. Thus, a decree of injunction against a non-resident of the state in which the action is brought cannot be supported upon process issued under authority of Section 57 of the Judicial Code. See *Kansas Gas & Electric Co.* v. *Wichita Natural Gas Company* (Cir. Ct. 8th Cir.) 266 F. 614, 617; *Gage* v. *Riverside Trust Co.* (Cir. Ct. S. D. Calif.) 156 F. 1002, 1005; *Ladew* v. *Tennessee Copper Co.* 218 U. S. 357, 367, 54 L. Ed. 1069, 1072.

We assume that counsel for petitioner will not seriously contest the fact that the decree as entered was in personam as to the defendant Lydick but will rely on that portion of the opinion of the Trial Court reading as follows: (R. p. 445):

> "The action brought by the plaintiff is one in rem and the defendants have not only answered, but *** the Receiver for the American Life Insurance Company in Texas asked for general equitable relief. It therefore appears that not only has this court jurisdiction of the subject matter but also of the parties."

The foregoing opinion of the Trial Court is erroneous in that such opinion entirely overlooks the following facts: (1) the first appearance of the defendant Lydick in the cause was made on February 20, 1940 by way of a special appearance and motion to dismiss for lack of jurisdiction over the person of the defendant Lydick (R. 16); (2) the Trial Court upon hearing overruled such motion by order entered effective as of March 25, 1940, (R. 28); (3) the dedendant Lydick duly and properly excepted to the order of the Court overruling Lydick's plea to the jurisdiction of the Court (R. 28). (4) Thereafter, on April 23, 1940, the defendant filed his answer specifically "reserving all objections to the jurisdiction of the Court heretofore made by motion duly filed." (R. 143).

Even before the effective date of the New Federal Rules for Civil Procedure, the action of the defendant in filing an answer to the merits after first pleading to the lack of jurisdiction and reserving an exception to an order of the Court overruling such plea to the jurisdiction, did not constitute a waiver of such objection nor the entry of a general appearance. In the case of *Harkness* v. *Hyde*, 8 Otto 476, 479, 25 L. Ed. 237, 238, the Supreme Court of the United States,

speaking through Mr. Justice Field, said: (p. 238)

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he leads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

Following the enactment of the New Federal Rules of Court Procedure in the case of *Vilter Mfg. Co.* v. *Rolaff* (Cir. Ct. 8th Cir.), 110 F. (2d) 491, the court said:

> As we understood plaintiff's position, she maintains that where one has entered a special appearance and moved to dismiss for want of jurisdiction of the parties, which motion is later denied, any further action by such moving party must be consonant with its position of 'non-presence,' and that if he voluntarily enters into any controversy that goes to the merits, he waives his jurisdictional objection

> and submits to the general purisdiction of the court. That plaintiff's position is not tenable in federal courts is free from doubt. Southern Pacific Co. v Denton, 146 U. S. 202, 13 S. Ct. 44, L. Ed. 942; Harkness v. Hyde, 98 U. S. 476, 24 L. Ed. 237. The rule in the state courts will not control. This is not a matter of substantive law. Furthermore, the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, have set at rest any question of waiver under the circumstances. See rule 12 (b) (d) (g) (h), Having raised the question of jurisdiction, the defendant was not prejudiced by participation in the trial and defending the matter on merits. In fact, under the new rules, it could have pleaded lack of jurisdiction in its answer with its defenses to the question of jurisdiction on appeal in the event of an adverse ruling.

To the same effect see *Gilmore* v. *Robillard* (Cir. Ct. 8th Cir.) 44 F. (2d) 295; *Leonardi* v. *Chase Nat. Bank of City of New York* (Cir. Ct. 2nd. Cir.) 81 F. (2) 19; *Devine* v. *Griffinhagen* (U. S. D. C., D. Conn.) 31 F. Supp. 624; *Duval* v. *Bahrick* (U. S. D. C. D. Minn.) 31 F. Supp. 510; *Moore's Federal Practice* Vol. 1, Sec. 12.04, pp 648, 649, 650.

Even before the enactment of the New Federal Rules it was well settled that:

> "The general prayer cannot broaden the relief beyond the pleadings; but the rule is now general that at a trial on the merits, the plaintiff or defendant shall have the relief appropriate to the facts that he has pleaded,

whether he has prayed for it or not." (Italics ours).

Simpkins Federal Practice, Sec 246 P. 268.

The New Federal Rules codify the older rule and provide, Rule 54 (c):

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in pleadings.*" (Italics ours)

Since a prayer of a pleading standing by itself is without vitality to limit, support or change the character of the judgment to be entered, it is in law a nullity Such being the character of a prayer, that added by Lydick to his answer constituted *nothing in law which could override his repeated and expressed intention to protest the jurisdiction of the Court.*

Even in the absence of the foregoing authorities, since the New Federal Rules of Civil Procedure were in effect at the time this case was filed, the act of the defendant Lydick in adding a prayer for general relief did not result in a waiver of his prior pleas to the jurisdiction. Rule 12 (b) reads:

> "*Every defense*, in law or fact, to a claim for relief in any pleading, *whether a claim. counterclaim, crossclaim, or third-party claim, shall be asserted* in the responsive pleading thereto if one is required, except that the following defenses may at the option of the

> pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.*" (Italics ours).

Thus, under the explicit provisions of Rule 12, even the inclusion of a counterclaim in a defendant's answer does not operate as a waiver of prior plea to the jurisdiction. See *Moore's Federal Practice*, Vol. 1 p. 648, which reads in part (pp 648-649):

> "Thus a defendant may present *every* defense in his answer, which may include such diverse defenses as (1)-(5), which do not go to the merits, (6), which is to the merits, a plea in abatement because of non-joinder of a co-obligor, a denial, in whole or in part, of the allegations contained in the complaint, an affirmative defense, a counterclaim against the plaintiff, and a cross-claim against a co-defendant ***

> "But, as stated above, a party may present *every* defense. (1)-(5) included, if he proceeds in the manner prescribed in Rule 12, without waiving any defense merely because he has joined such defenses as (1)-(5) with defenses on the merits.

> "Special appearances are no longer necessary in any case. A party who proceeds in accordance with Rule 12 can raise any and all defenses without waiver."

To the same effect see *Vilter Mfg. Co.* v *Rolaff* (Cir. Ct. 8th Cir.) 110 F. (2d) 491; *Devine* v. *Griffenhagen* (D. Ct. D. Conn.) 31 F. Supp. 624; *Glazier* v. *Van Sant* (D. Ct. W. D. Mo.) 33 F. Supp. 113.

We respectfully submit that the trial court erred in overruling the objections of Lydick to the jurisdiction of the trial court over the person of Lydick, that Lydick in no sense waived objection to the jurisdiction of the court over his person and that having taken suitable exception to the action of the trial court the error in the trial court's ruling was preserved, and the Circuit Court of Appeals properly held that the trial court had no jurisdiction over the person of Lydick and this court should affirm the opinion of the Circuit Court of Appeals, for the Eighth Circuit so holding.

CONCLUSION

If we are correct in the foregoing argument, then we submit that the legal effect of that argument, taken by sections of the brief, is:

(a) Section I of this brief, pages 8 to 22, demonstrates upon the undisputed facts that the Circuit Court of Appeals correctly held that the power to determine the right to administer debts due from citizens of states other than Iowa was not in the Trial Court, where that right was in the insolvent

corporation on the effective day of the appointment of its several receivers; that on said day the contract right to administer the debts vested in the receivers of the insolvent corporation appointed in states having physical control of the debtors, and thereafter could not be divested by subsequent judicial proceedings in the Iowa State Court.

(b) The admitted rule that an adverse holder of property of an insolvent corporation can maintain possession as against its trustee in bankruptcy, or receiver, does not apply in the case at bar. Section III of this brief demonstrates that here petitioner had surrendered his claimed adverse possession to the state court and held as its receiver. Therefore, the Circuit Court of Appeals correctly ruled that the Trial Court could not be called upon to collaterally review the rulings of the respective state courts affecting their jurisdiction.

(c) The analysis made in Section III, taken with a consideration of the authorities in Section I, pages 17 to 22, demonstrates the misconception of the litigation held by dissenting Judge Johnson. First, the power to administer the mortgages was not property in Iowa insofar as the debtors lived in other states, and, therefore, the sovereignty of Iowa over property within its borders was not in issue. Second, the fact that Fischer had surrendered his purported adverse possession and held as receiver, obviated the application of the general rule that the receiver takes custody subject to adverse claims.

(d) Section II, pages 22 to 25, relating to real estate, and Section IV, pages 31 to 39, relating to lack of service, are, we submit, indisputable. We urge that these matters are controlling here, and that the opinion of the Circuit Court of Appeals with respect to them cannot be overruled.

We respectfully submit that the result sought by respondents here is consonant with the best interests of all of the policy holders of the insolvent corporation, including the group petitioner claims to represent. That the principles of law upon which we rely when by this Court applied to the facts at bar expedite the reorganization of insolvent life insurance companies, as well as corporations subject to the bankruptcy law; that useless and conflicting receivership proceedings will thereby be avoided, and that the orderly division of jurisdiction between courts of equal rank and within the same territory will be fully preserved and the dignity of each forum not impaired.

WHEREFORE, Respondent Texas Receiver, respectfully prays that the opinion and decree of the Circuit Court of Appeals, Eighth Circuit, be in all things affirmed.

Respectfully submitted,
H. T. McGOWN
B. E. GODFREY
JOHN M. SCOTT
Fort Worth, Texas.
Counsel for Dan E. Lydick, Respondent, Receiver.

H. L. LOGAN, JR.
Of Counsel

SUPREME COURT OF THE UNITED STATES.

No. 91.—October Term, 1941.

Charles R. Fischer, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company, Petitioner,
vs.
American United Life Insurance Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 5, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The question presented by this case is whether the United States District Court for the Southern District of Iowa had jurisdiction to determine a dispute between the Iowa receiver of American Life Insurance Co. on the one hand and the Michigan and Texas receivers on the other[1] as respects the title to and the right to administer certain assets of the company in the possession of the Iowa receiver. The District Court held that it had jurisdiction over the controversy; and it made a determination of the issues on the merits. The Circuit Court of Appeals, one judge dissenting, reversed (117 F. 2d 811) holding that in light of such cases as *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, the suit in the District Court could not be maintained and that the bill should be dismissed "for want of jurisdiction". We granted the petition for certiorari because an application of the principles underlying *United States* v. *Klein*, 303 U. S. 276, and *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, which were disregarded by the court below, would probably lead to a different result.

The Iowa receiver brought the suit pursuant to the authority and direction of the Iowa court. It is based upon diversity of citizen-

[1] The Iowa receiver also sought relief against respondent American United Life Insurance Co. which, after institution of the receivership proceedings and the appointment of receivers for American Life Insurance Co., entered into a written agreement for the reinsurance of the business of American Life Insurance Co. and issued a certificate of assumption for all insurance policies outstanding of American Life Insurance Co. We mention the fact without more, because the presence of that respondent is not material to the jurisdictional aspects of the case with which we are here solely concerned.

ship (Judicial Code, § 24, 28 U. S. C. § 41) and seeks to enforce against nonresident defendants, as authorized by § 57 of the Judicial Code, 28 U. S. C. § 118, a "legal or equitable lien upon or claim to" personal property within the district where the suit is brought and to remove an "incumbrance or lien or cloud upon the title" to such property. The bill in substance alleged and the District Court found that the Iowa receiver was in possession of securities of a face amount in excess of $3,000,000; that those securities had been deposited with the Insurance Commissioner of Iowa, pursuant to statutes of Iowa and certain reinsurance agreements between American Life Insurance Co. and its Iowa predecessor, for protection of the policy holders of the latter company on its insolvency; that Iowa had title to those funds and the Iowa receiver had the sole and exclusive right to administer them. The District Court held that although the action was *in rem* it had not only jurisdiction over the subject matter but also over the defendants since they all answered and since two of them filed counterclaims asking that the securities in possession of the Iowa receiver be delivered to them and since the other asked for general equitable relief. Accordingly, it ordered, *inter alia*, that the Michigan and Texas receivers account for certain collections[2] which they had made on the securities in the Iowa fund; that they deliver to the Iowa receiver certain records pertaining to those securities; that the Michigan receiver deliver to the Iowa receiver certain records pertaining to the policies protected by that fund; and that the Michigan and Texas receivers be enjoined from making collections on those securities and from interfering in any way with the Iowa receiver's administration of them.

We express no opinion on the merits of the controversy. Nor do we pass on the contention that *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, prevents the entry of an *in personam* judgment in the circumstances of this case. For the sole question passed upon by the court below was the power and propriety of the action of the District Court in taking jurisdiction of the cause under § 57 of the Judicial Code.

It is immaterial to this inquiry whether the Michigan receiver acquired no interest in or power over assets outside of Michigan (*Booth* v. *Clark*, 17 How. 322), or, as held by the court below, was the statutory successor under Michigan law of American Life

[2] The Michigan receiver had been collecting in Michigan and the Texas receiver in Texas principal and income on the securities deposited in Iowa from obligors residing in their respective states. Certain remittances have been made by the Michigan receiver to the Iowa receiver pursuant to an agreement between them. The Texas receiver holds the amounts collected in Texas.

Insurance Co. and as such had title to all of its assets wherever situated. *Relfe* v. *Rundle*, 103 U. S. 222, 225; *Clark* v. *Williard*, 292 U. S. 112, 120. Cf. *Converse* v. *Hamilton*, 224 U. S. 243. Even though the latter were true, claimants entitled to the benefits of the fund in Iowa might pursue their suits and remedies against it in derogation of the claim of the Michigan receiver, if that were Iowa's policy. *Clark* v. *Williard*, 294 U. S. 211. That is the asserted Iowa policy here. The Iowa receiver is in possession of the securities in question. He seeks, with the approval of the Iowa court, an authoritative determination by the federal court of the question whether under Iowa law those securities and the collections thereon should not be held for the special class of claimants for whom the fund was allegedly established. The federal court has the power to resolve the controversy. And there is no consideration of judicial administration based on appropriate deference to the state courts why it should not exercise it.

Lion Bonding & Surety Co. v. *Karatz, supra*, does not stand in the way. There the federal court through its receivers assumed command over property which was in the possession of the state court. That action was taken in violation of the well-settled principle (pp. 88-89) that "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts." Such possession of the *res* by the state court disenabled the federal court from exercising any control over it. But a determination of the issues in this controversy does not necessarily involve a disturbance of the possession or control of the Michigan and Texas courts over the property in their possession. It would indeed have no such necessary consequence even though the securities in question were in their possession. As held in *United States* v. *Klein, supra*, p. 281, a state court may properly adjudicate rights in property in possession of a federal court[3] and render any judgment "not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property." And see *Riehle* v. *Margolies*, 279 U. S. 218, 224-226. The same procedure may be followed by a federal court with respect to property in the possession of a state court. *General Baking Co.* v. *Harr*, 300 U. S. 433;

[3] As to bankruptcy see Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734; Straton v. New, 283 U. S. 318.

Commonwealth Trust Co. v. *Bradford, supra; Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *Ingersoll* v. *Coram*, 211 U. S. 335; *Byers* v. *McAuley*, 149 U. S. 608, 620. The appropriate exercise of the discretion of a federal court of equity may require it to refuse even to adjudicate rights in specific property if the state court has already undertaken such a determination. *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 382. Furthermore, the federal court may not "seize and control the property which is in the possession of the state court" nor interfere with the state court or its functions. *Waterman* v. *Canal-Louisiana Bank & Trust Co., supra*, pp. 44, 45; *Princess Lida* v. *Thompson*, 305 U. S. 456. Short of that, however, the federal court may go. Cf. *Oakes* v. *Lake*, 290 U. S. 59.

Tested by those standards, assumption of jurisdiction by the federal court was wholly proper. A determination by it of the rights of the parties in the *res* could be had "with proper regard for the rightful independence of state governments in carrying out their domestic policy" (*Pennsylvania* v. *Williams*, 294 U. S. 176, 185) and in full recognition of the necessity for "harmonious coöperation of federal and state tribunals." *Princess Lida* v. *Thompson, supra*, p. 466. We repeat that neither Michigan nor Texas is entitled to the securities if such a disposition of them would contravene Iowa law. A determination of the nature and the extent of the rights of Iowa and its receiver in the securities clearly would not constitute an interference with the jurisdiction of the Michigan and Texas courts. For even if those courts were in possession of the fund, their jurisdiction would not be so exclusive as to bar an adjudication by the federal court of the rights of a claimant to the *res* or the quantum of his interest in it. *United States* v. *Klein, supra*. It follows *a fortiori* that where as here they are not in possession of the *res*, such a decree of the federal court is proper. Though binding on the parties, both as respects their rights to the fund and the collections thereon, it is not disruptive of orderly administration by the state courts nor conducive to unseemly collisions between the state and federal authorities. For unlike the situation in *Kelleam* v. *Maryland Casualty Co., supra*, the state court which has command over the *res* has not only not undertaken an adjudication of the controversy; it has referred the matter to the federal court.

Whether the scope of the decree entered by the District Court was proper we do not decide. We only hold that the District Court

had jurisdiction to resolve the controversy under § 57 of the Judicial Code. The Circuit Court of Appeals should have decided what rights under Iowa law Iowa and its receiver had to the securities and the collections thereon and whether the decree entered by the District Court was kept within the appropriate limits. Since the Circuit Court of Appeals did not decide those questions, we reverse its judgment and remand the cause to it for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice ROBERTS did not participate in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.